82-1308

No.

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IN THE

Supreme Court of the United States

October Term, 1982

THE WILMINGTON MEDICAL CENTER, INC., and CRAWFORD H. GREENWALT, as Chairman of the Board of Trustees, and JOSEPH A. DALLAS, as Chairman of the Board of Directors,

Petitioners,

v.

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PUERTO RICAN CIVIL RIGHTS LEAGUE, INC., OLDER AMERICANS COALITION, WILMINGTON UNITED NEIGHBORHOODS, BRANDYWINE TRINITY METHODIST CHURCH, on Behalf of Their Members and Others Similarly Situated, and RAYMOND W. BROWN, MARIA GALINDEZ, for Herself and as Parent and Guardian for Her Minor Children, Reynaldo Galindez and Pedro Galindez, MILAGRO QUINONES, DENISE SMOKES, on Behalf of Themselves and Others Similarly Situated; and CITY OF WILMINGTON, a Municipal Corporation,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1072

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PUERTO RICAN CIVIL RIGHTS LEAGUE, INC., OLDER AMERICANS COALITION, WILMINGTON UNITED NEIGHBORHOODS, BRANDYWINE TRINITY METHODIST CHURCH, on behalf of their members and others similarly situated, and RAYMOND W. BROWN, MARIA GLAINDEZ, for herself and as parent and guardian for her minor children, Reynaldo Galindez and Pedro Galindez, MILAGRO QUINONES, DENISE SMOKES, on behalf of themselves and others similarly situated; and CITY OF WILMINGTON, a municipal corporation,

Appellants

v.

THE WILMINGTON MEDICAL CENTER, INC., and CRAWFORD H. GREENWALT, as Chairman of the Board of Trustees, and JOSEPH A. DALLAS, as Chairman of the Board of Directors

(D.C. Civil No. 76-0298)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Submitted: July 29, 1982

Before: GIBBONS and HUNTER, *Circuit Judges*
and POLLAK, *District Judge**

(Opinion Filed September 20, 1982)

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*Hon. Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

GIBBONS, *Circuit Judge*.

This appeal arises out of the district court's denial of an application for attorneys' fees made pursuant to the Civil Rights Attorneys Fee Awards Act, 42 U.S.C. §1988, by the NAACP (plaintiffs), after trial on a claim of discrimination by the Wilmington Medical Center, Inc. (WMC). The district court denied the plaintiffs' application because it found that the plaintiffs were not the prevailing party in the litigation. We reverse and remand to the district court for computation of the amount of a fee award.

I.

The plaintiffs' class action complaint was filed on September 10, 1976 and alleged that WMC violated Title

VI of the 1964 Civil Rights Act, 42 U.S.C. §2000d,[1] and section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794,[2] by

> selecting a site for the relocation and removal of certain inpatient and outpatient services which has the effect of excluding persons from participation in, denying them the benefits of, and subjecting them to discrimination and segregation on the basis of race, national origin, or physical handicap.

Complaint ¶ 29, App. 27. The Secretary of the United States Department of Health, Education and Welfare (HEW), the Director of the Bureau of Comprehensive Health Planning (BSHP) and the Chairman of the Health Planning Council, Inc. were also named as defendants for having approved the relocation plans under section 1122 of the Social Security Act, 42 U.S.C. §1320a-1, without regard to compliance with Title VI and section 504.

Plan Omega, as WMC's hospital relocation plan was called, involved closing two of WMC's Wilmington hospitals, building a new hospital south of Wilmington (the Southwest Division), and renovating a downtown hospital (the Delaware Division). The plaintiff class, consisting of blacks, Puerto Ricans and handicapped persons, alleged that Plan Omega would result in inadequate ac-

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1. 42 U.S.C. §2000d provides:

> No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

2. 29 U.S.C. §794 provides:

> No otherwise qualified handicapped individual in the United States . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any activity receiving Federal financial assistance.

cess to health care for minorities, diminished quality of health care at the Delaware Division and racial identifiability of the Delaware Division. The plaintiff classes sought declaratory and injunctive relief against Plan Omega.

Late in 1976, cross motions for summary judgment were filed by HEW, the state planning agencies and the plaintiffs. HEW also filed a motion to dismiss. WMC was not involved in these motions since it had previously moved for a separate trial on the substantive issue of discrimination.

The government agencies argued that plaintiffs had failed to exhaust their administrative remedies with regard to the civil rights claims. Plaintiffs contended that pursuit of administrative remedies would be futile, since HEW lacked experience and resources with which to conduct hospital relocation investigations, and because HEW had taken the position that procedures under section 1122 of the Social Security Act did not contemplate an investigation. *See NAACP v. Wilmington Medical Center, Inc. (WMC)*, 599 F.2d 1247, 1249 n.6 (3d Cir. 1979).

Over plaintiffs' objections, the district court on January 19, 1977 temporarily stayed the action and ordered HEW to conduct a civil rights investigation. *NAACP v. WMC*, 426 F.Supp. 919, 925 (D.Del. 1977). The district court wrote:

> In view of the grave doubt created by plaintiffs over [HEW's] capability to perform the appropriate review, [HEW] will be requested to submit . . . a detailed plan for processing plaintiffs' complaint . . . . If it later appears that [HEW] is unable or unwilling to conduct [its] review in a timely fashion . . . the Court may find that exhaustion of administrative remedies would be futile . . . .

Id.

The HEW investigation began on January 19, 1977. On July 5, 1977 HEW's Office for Civil Rights issued a letter which concluded that the proposed relocation plan constituted a *prima facie* violation of Title VI and section 504 because it would have a disparate impact based on race and handicap and was not "justified by substantial considerations unrelated to race, national origin or handicap."

On November 1, 1977, after extensive negotiations between HEW and WMC, they entered into a Contract of Assurances (Supplemental Agreement), in which WMC promised to provide transportation between the Delaware and Southwest Divisions, institute a system to allocate patients to preclude racial identification of the Delaware Division and alter construction plans to comply with requirements of section 504.[3]

Plaintiffs filed a second amended complaint challenging the Supplemental Agreement, and claiming that WMC violated Title VI and section 504 by entering into it. The district court on April 7, 1978 held that HEW's decision that the modified Plan Omega complied with Title VI and section 504 was not arbitrary or capricious and therefore did not violate the Administrative Procedure Act, and that plaintiffs had no private cause of action to challenge the agreement. *NAACP v. WMC*, 453 F. Supp. 280 (D.Del. 1978). In a separate opinion, the district court also rejected plaintiffs' contention that they had a due process right to a hearing before the agency. *NAACP v. WMC*, 453 F.Supp. 330 (D.Del. 1978).[4] On appeal, this court reversed the district court's private

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3. On August 16, 1977 the district court decided that HEW was not under a duty to file an environmental impact statement with respect to its review of Plan Omega. NAACP v. WMC, 436 F.Supp. 1194 (D.Del. 1977), *aff'd*, 584 F.2d 619 (3d Cir. 1978).

4. In a separate but related case, the district court rejected a claim that HEW's approval of Plan Omega violated section 1122. Wilmington United Neighborhoods v. HEW, 458 F.Supp. 628 (D.Del. 1978), *aff'd*, 615 F.2d 112 (3d Cir. 1980).

cause of action holding and remanded the case for proceedings on the merits of the discrimination claim. *NAACP v. WMC, Inc.*, 599 F.2d 1247 (3d Cir. 1979).[5] On remand the district court dismissed HEW and the state planning agencies as defendants. Plaintiffs filed a third amended complaint on September 4, 1979, which added the City of Wilmington as a party plaintiff and alleged causes of action under the Age Discrimination Act of 1975, 42 U.S.C. §6102 and for intentional discrimination under Title VI and section 504.

A month-long trial without a jury was held. On May 13, 1980, the district court issued its opinion finding that plaintiffs failed to prove discrimination on any of their claims. *NAACP v. WMC, Inc.*, 491 F.Supp. 290 (D.Del. 1980). This court, sitting *en banc*, affirmed. *NAACP v. WMC*, 657 F.2d 1322 (3d Cir. 1981).

After trial, the plaintiffs moved under the Civil Rights Attorneys Fee Act, 42 U.S.C. §1988 (1976),[6] and the attorneys fee provision of the Rehabilitation Act, 29 U.S.C. §794a(b) for an award of attorneys fees in the amount of $313,390.73. In an opinion and order dated December 21, 1981, the district court denied the application on the ground that plaintiffs were not "prevailing

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5. The court of appeals reserved the issue under the Administrative Procedure Act, and found no occasion to address the due process question. 599 F.2d at 1250, n.10.

6. The Civil Rights Attorney's Fee Awards Act provides:

> [I]n any civil action or proceeding to enforce . . . Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §1988 (1976).

The Attorney Fee provision of the Rehabilitation Act is similar:

> In any action or proceeding to enforce or charge a violation of a provision (of the Rehabilitation Act) the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . .

29 U.S.C. §794a(b).

parties" with respect to WMC and rejected plaintiffs' argument that they were entitled to fees for work done in connection with the private right of action issue, because their success on that procedural issue had done "nothing to advance the plaintiffs' claims for relief. . . ." App. at 283. The district court also rejected plaintiffs' contention that, since they filed the lawsuit, they were the "catalyst" which prompted the court to order the HEW investigation which resulted in the Supplemental Agreement. The court found that the catalyst which had resulted in the HEW investigation was the motions to dismiss or alternatively for summary judgment filed by HEW and BCHP. Since WMC neither participated in nor supported these motions, the district court concluded:

> It would be most illogical to saddle WMC with attorney's fees for the extensive work of plaintiffs in resisting the motion of HEW and BCHP and the Court's direction to HEW to conduct an administrative review when WMC did not participate in the briefing of these issues at all. Thus, it cannot be said that plaintiffs prevailed over WMC on this phase of the litigation.

App. at 286-287.

The district court also denied fees for work done by plaintiffs in connection with the Supplemental Agreement because the plaintiffs were not parties to the HEW investigation or negotiations over the Supplemental Agreement, and because "any benefit conferred by the Supplemental Agreement were [sic] not casually [sic] related to plaintiffs' efforts, but were instead the result of HEW and WMC's independent efforts." App. at 288.

On January 18, 1982 the NAACP filed its notice of appeal from the district court order denying the fee application.

II.

Fees for Establishing a Private Cause of Action Under Title VI.

There is no question that a prevailing party can be awarded fees before the conclusion of protracted litigation. Awards of fees *pendente lite* are specifically approved in the legislative history accompanying the Fee Act. The Senate Report states that fee awards are "especially appropriate where a party has prevailed on an important matter in the course of litigation, even when he ultimately does not prevail on all issues." Sen. Rep. No. 1011, 94th Cong., 2d Session 5, *reprinted* in 1976 U.S. Code Cong. & Ad. News 5908, 5912 (Senate Report). The House Report likewise states that fees should be allowed after "any order that determines substantial rights of the parties. . . ." H. Rep. No. 1558, 94th Cong., 2d Sess. 8 (House Report). *See Bradley v. School Board of City of Richmond*, 416 U.S. 696 (1974); *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970).

In *Bradley*, plaintiffs established defendants' liability in a school desegregation case and then filed a motion seeking further remedies and an award of fees. The district court rejected plaintiffs' proposed remedy, but ultimately awarded them fees for work in connection for their motion for further relief. The Supreme Court affirmed the award of fees, and noted that "entry of any order that determines substantial rights of the parties may be an appropriate occasion upon which to consider the propriety of an award of counsel fees. . . ." 416 U.S. at 722, n.28.[7]

A party who has succeeded on the merits thus is beyond question entitled to fees *pendente lite*. A party who prevails on a purely procedural issue, however, after

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7. Earlier, in *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375 (1970), the Court had held that plaintiffs were entitled to fees immediately after establishing liability.

Hanrahan v. Hampton, 446 U.S. 754 (1980), is not considered a prevailing party. In *Hanrahan*, plaintiffs lost numerous discovery motions and after trial, the district court directed a verdict against them. The Seventh Circuit reversed the directed verdict and allowed fees. The Supreme Court, concluding that plaintiffs were not " 'prevailing' parties in the sense intended by 42 U.S.C. §1988," reversed the award of fees:

> The Court of Appeals held only that [plaintiffs] were entitled to a trial of their cause. As a practical matter they are in a position no different from that they would have occupied if they had simply defeated the defendants' motion for a directed verdict in the trial court. . . . As is true of other procedural or evidentiary rulings, these determinations may affect the disposition on the merits, but were themselves not matters on which a party could "prevail" for purposes of shifting his counsel fees to the prevailing party under §1988.

446 U.S. at 758-59. *See also Swietlowich v. County of Bucks*, 620 F.2d 33 (3d Cir. 1980).

The plaintiffs' appellate victory on the private cause of action issue falls between *Bradley* and *Hanrahan*. Plaintiffs claim that securing a private right of action was not a "purely procedural victory," and argue that *Hanrahan* and similar cases, *e.g.*, *Swietlowich v. County of Bucks*, 620 F.2d 33 (3d Cir. 1980) (remand for new trial due to error in jury instructions); *Bly v. McLeod*, 605 F.2d 134 (4th Cir. 1979), *cert. denied*. 445 U.S. 928 (1980) (plaintiff obtained TRO, but no decision on the merits), are distinguishable because those plaintiffs' successes had no "ultimate or independent value." Here, plaintiffs contend, the private cause of action success secured to plaintiffs "substantial rights against WMC." Brief at 47. Plaintiffs rely on *Bagby v. Beal*, 606 F.2d 411 (3d Cir. 1979), in which a plaintiff filed a section 1983 action for failure to provide her with a hearing prior to

suspending her from employment with the State of Pennsylvania. Although plaintiff's suspension was ultimately upheld, this court ordered that she be awarded fees for her success on the due process claims. Plaintiffs' reliance on *Bagby v. Beal* is misplaced, since in that case the plaintiff's cause of action was based on a violation of due process and she did indeed prevail on that claim.

> There is no question that appellee essentially succeeded on her due process claims. The district court found in her favor and ordered that she be afforded a hearing. She already has received this hearing and no action taken by this court can change the fact that she has "accomplished the objectives of [her] litigation." Thus appellee is a prevailing party under §1988.

606 F.2d at 415 (citation omitted).

In this case, by contrast, plaintiffs neither won a benefit nor vindicated a right which flowed from the merits of their discrimination claim.[8] Since this court's decision that plaintiffs had a private cause of action did "nothing to advance the plaintiff's claim for relief" and left the plaintiffs "no closer to a verdict in [their] favor than [they were] before the . . . trial began," these plaintiffs cannot be regarded as having prevailed within the meaning of section 1988. *See Swietlowich v. County of Bucks*, 620 F.2d at 34. Accordingly, we hold that the district court did not abuse its discretion in refusing to award fees for the plaintiffs' success in securing a private right of action.

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8. Cases awarding fees when plaintiffs obtain TROs or preliminary injunctions do not advance plaintiffs' position, since an injunction involves a decision on the merits, and grants relief, albeit temporarily. *E.g.*, Williams v. Alioto, 625 F.2d 845 (9th Cir. 1980), *cert. denied*, 450 U.S. 1012 (1981); Doe v. Marshall, 622 F.2d 118 (5th Cir. 1980), *cert. denied*, 451 U.S. 993 (1981); Iranian Students Ass'n v. Edwards, 604 F.2d 352 (5th Cir. 1979).

III.

Fees for Time Expended on the Supplemental Agreement.

The plaintiffs' claim that they are entitled to attorneys' fees for their efforts leading up to the Supplemental Agreement presents a different issue, however. It is settled law in this circuit that as long as a plaintiff achieves some of the benefits sought in initiating a lawsuit, even though the plaintiff does not ultimately succeed in securing a favorable judgment, the plaintiff can be considered the prevailing party for purposes of a fee award. *E.g., Sullivan v. Pennsylvania Department of Labor and Industry*, 663 F.2d 443 (3d Cir. 1981), *cert. denied*, ____ U.S. ____, 102 S. Ct. 1716 (1982); *Bagby v. Beal*, 606 F.2d 411. Because the district court applied the incorrect standard to plaintiffs' application for fees for time expended on the Supplemental Agreement, we reverse the December 21, 1981 Order denying a fee award, and remand this case to the district court.

Attorneys' fee awards can be, and often are, awarded to parties who do not ultimately obtain the whole relief sought in the litigation. The House Report approves this approach:

> The phrase "prevailing party" is not intended to be limited to the victor only after entry of a final judgment following a full trial on the merits. It would also include a litigant who succeeds even if the case is concluded prior to a full evidentiary hearing before a judge or jury. If the litigation terminates by consent decree, for example, it would be proper to award counsel fees. . . . Similarly, after a complaint is filed, a defendant might voluntarily cease the unlawful practice. A court should still award fees even though it might conclude, as a matter of equity, that no formal relief, such as an injunction, is needed.

House Report at 7 (citations omitted). The Senate Report notes that a plaintiff need not win on all issues, but must only prevail on ". . . an important matter in the course of the litigation. . . ." Senate Report at 5. Any success achieved by plaintiff need not be achieved in a formal manner; a plaintiff is considered the prevailing party if his "lawsuit acted as a catalyst which prompted [the defendant] to take action" to correct the unlawful practice. *Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970). *See also Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971) (plaintiffs-intervenors ultimately held to lack standing awarded fees for causing suit to be filed); *Fisher v. Proctor & Gamble Mfg. Co.*, 613 F.2d 527 (5th Cir. 1980), *cert. denied*, 449 U.S. 1115 (1981) (Title VII class members who did not intervene but opposed consent degree awarded fees); *Keyes v. School District No. 1*, 439 F.Supp. 393 (D.Colo. 1977) (intervenor plaintiff awarded fees although work was performed at remedy stage and remedy proposed by intervenor was not adopted by court).

The standard used in this circuit for determining a plaintiff's prevailing party status is whether plaintiff achieved "some of the benefit sought" by the party bringing the suit. *Bagby v. Beal*, 606 F.2d at 415. *See also Ramos v. Koebig*, 638 F.2d 838 (5th Cir. 1981); *Chicano Police Officers Association v. Stover*, 624 F.2d 127 (10th Cir. 1980); *Gagne v. Maher*, 594 F.2d 336 (2d Cir. 1979), *aff'd*, 448 U.S. 122 (1980); *Nadeau v. Helgemoe*, 581 F.2d 275, 278-79 (1st Cir. 1978). The fact that a judgment in the district court was ultimately entered in favor of WMC does not make plaintiffs any less the prevailing party. *See Sullivan v. Pennsylvania Department of Labor and Industry*, 663 F.2d at 447-48; *Bagby v. Beal*, 606 F.2d at 415. Nor is it dispositive that the plaintiffs never obtained the injunction or declara-

tory judgment they sought agianst Plan Omega. Although there would be no question that plaintiffs would be entitled to fees had they obtained such relief, it is clear that as long as they can establish causation between their litigation and "some of the benefits" they sought, *see Bagby v. Beal*, 606 F.2d at 415, they have prevailed for purposes of section 1988.

A.

Some of the Benefits Sought by the Litigation

The complaint filed by plaintiffs sought a remedy for the discriminatory effects of Plan Omega and alleged:

> 19. [WMC] has proposed a plan . . . to discontinue most non-emergency out-patient and inpatient services at the Wilmington facility and transfer them to a new facility. . . .
>
> . . .
>
> 21. The proposed hospital site is located in an area which is inaccessible to the vast majority of the minority and handicapped residents of New Castle County. . . .
>
> 22. The location of the facilities proposed under Plan Omega will have the effect of creating a dual hospital system — a new 800-bed tertiary care facility to serve a low-density suburban, white and affluent population and an older inferior 250-bed facility to serve a high density, inner city minority, handicapped and poorer population. This plan will have the effect of excluding persons from, denying them the benefit of, and otherwise discriminating against and segregating them on the basis of race, national origin, and handicap in a facility receiving federal financial assistance.

App. at 25-26. Plaintiffs thus complained of unequal access and quality of care for minorities, the elderly and handicapped, and racial identifiability of the hospitals.

After the district court ordered HEW to investigate, HEW found discriminatory effects in the plan. WMC then contractually bound itself to make modifications to remedy the discriminatory impact of Plan Omega. In its *en banc* opinion on the merits, this court found that WMC adequately justified the amended Plan Omega. This result was based directly on the changes made in the Plan as a result of the Supplemental Agreement:

> To ensure that Omega would comply with Title VI and the Rehabilitation Act, WMC contracted to make a number of modifications. Because no public transportation to the Southwest site is available, WMC agreed to provide shuttle bus service between the Delaware and the Southwest divisions . . . . In addition, WMC committed itself to renovate the Delaware plant, devise inpatient service plans for the two branches to prevent racial identifiability at either location, and operate the two facilities on a unitary basis.
>
> Upon acceptance of these conditions, HEW withdrew its objections to Omega.

NAACP v. Wilmington Medical Center, Inc., 657 F.2d 1322, 1325 (3d Cir. 1981) (*en banc*). In short, the Supplemental Agreement was found to "overcome all defects in Plan Omega bearing upon the vital issues of transportation, racial identifiability and quality of service." *Id.* at 1351 (Gibbons, J., dissenting).

The plaintiffs achieved some of the benefits they sought in initiating their law suit when the Supplemental Agreement was executed to remedy the *prima facie* violations of Title VI found by HEW. The district court itself clearly regarded the Supplemental Agreement as a remedy for Plan Omega's discriminatory effects. *See, e.g.*, 453 F. Supp. at 321, 325.

The district court further found that the agreement

> constitutes a binding and specifically enforceable contract . . . which obligate[s] WMC to modify and

supplement those particular features of Plan Omega which HEW believes will otherwise have a discriminatory effect.

NAACP v. WMC, 453 F. Supp. at 280, 292.

The district court, in focusing on the fact that after the Supplemental Agreement was executed the plaintiffs amended their complaint to attack the plan, applied the wrong standard in determining that plaintiffs were not prevailing parties. First, the plaintiffs' request for attorneys' fees relates only to challenges to the original plan and not to challenges to the Supplemental Agreement. App. at 175. Plaintiffs did not request, and, indeed cannot recover fees for the time expended on their amended complaints since they in no way prevailed on those claims. But the fact that the relief obtained by virtue of the Supplemental Agreement was, in the plaintiffs' view, inadequate and subject to attack does not deprive plaintiffs of their status as prevailing parties with respect to that relief. Second, the district court rejected the plaintiffs' argument that the terms of the Supplemental Agreement were benefits sought by the plaintiffs in the litigation. WMC makes this same mistake on appeal by arguing that because the plaintiffs did not obtain either an injunction or declaratory judgment against Plan Omega, they did not prevail. The issue is not whether plaintiffs obtained the form or extent of relief they originally requested, but whether the "substance of the litigation's outcome . . . provided much of the relief appellants had initially sought." *Ross v. Horn*, 598 F.2d 1312, 1322 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980).

On this first prong of the "prevailing party" test, we hold that the district court abused its discretion in refusing to find that the plaintiffs prevailed because they achieved some of the benefits originally sought in their litigation.

B.

Plaintiffs as Catalysts for the Supplemental Agreement

The district court found that the plaintiffs' efforts were not the material cause of any benefit secured by the Supplemental Agreement, because the mere filing of the complaint did not in itself prompt the court to refer the matter to HEW for an investigation. App. at 288. The district court apparently believed that, because plaintiffs opposed HEW's and BCHP's motion to dismiss the complaint for failure to exhaust administrative remedies, the plaintiffs could not claim the benefits resulting from the HEW investigation.

Here again, the district court applied the wrong standard in determining what was the catalyst for the relief obtained through the Supplemental Agreement. In *Sullivan v. Pennsylvania Department of Labor and Industry*, 663 F.2d 443, this court described the causation test applied in this circuit:

> [W]e have articulated a causal-connection standard whose central inquiry has been variously stated as whether the plaintiff obtained the relief sought "*as a result of*" *the civil rights judicial efforts, or whether these efforts were "a material factor"* in obtaining the relief.

663 F.2d at 449 (emphasis added) (citation omitted). The critical factor in determining causation is, therefore, whether the relief was implemented as a result of plaintiffs *lawsuit*. *Morrison v. Ayoob*, 627 F.2d 669 (3d Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1102 (1981); *Ross v. Horn*, 598 F.2d at 1322.

Furthermore, the plaintiffs' lawsuit need not be the sole cause of the ultimate relief. In *Morrison v. Ayoob*, this court's per curiam opinion said:

> Where there is more than one cause, the plaintiff is a prevailing party if the action was a *material factor* in bringing about the defendant's [cessation of ar-

guably illegal conduct]. To hold otherwise would be inconsistent with the broad remedial purpose of §1988 because in many cases causation will hinge on the defendant's motivation. To require some stricter standard of causation would mean that the defendant could hide his true motivation behind what seems a plausible alternate justification.

627 F.2d at 671 (emphasis added) (citation omitted).

The district court, based on *Ross*, *Morrison* and *Sullivan*, was bound to apply the most expansive definition of causation.[9] If, after filing of suit, WMC had voluntarily amended Plan Omega, there would be little doubt that plaintiffs could be entitled to fees. *See, e.g., Parham v. Southwestern Bell Telephone Co.*, 433 F.2d 421 (8th Cir. 1970), *cited with approval in* Senate Report at 5; House Report at 7. There is no sound reason for departure from this practice simply because the district court ordered the administrative investigation and the changes in Plan Omega were not voluntarily instituted.

Because the district court applied the wrong standard in determining whether plaintiffs' efforts were a material factor in bringing about a remedy to the discriminatory effects of Plan Omega, we reverse.

C.

Attorneys' Fees for Administrative Proceedings

The fact that the plaintiffs' success occurred as the result of an administrative proceeding is no obstacle to plaintiffs' status as the prevailing party for purposes of 42 U.S.C. §1988. The language of section 1988 provides for attorneys fees in "any action *or proceeding*" to enforce Title VI. In *New York Gaslight Club, Inc. v. Carey*,

9. This view is consistent with other circuits. *E.g.*, Chicano Police Officers Association v. Stover, 624 F.2d 127, 131 (10th Cir. 1980); Criterion Club v. Board of Commissioners, 594 F.2d 118 (5th Cir. 1979).

447 U.S. 54 (1980), the Supreme Court decided that the same phrase in Title VII indicated Congress' intent to subject the losing party to attorney's fees for administrative proceedings:

> The question presented is whether, in the words of the statute, respondent was the "prevailing party" in an "action or proceeding under this title." An examination of the language and history of the statute, the nature of the proceedings in which respondent participated, and the relationship of those proceedings to Title VII's enforcement mechanisms, together persuade us that Congress clearly intended to authorize awards of attorney's fees to persons in respondent's situation.
>
> Congress' use of the broadly inclusive disjunctive phrase "action or proceeding" indicates an intent to subject the losing party to an award of attorney's fees and costs that includes expenses incurred for administrative proceedings.

447 U.S. at 61.[10]

The fact that plaintiffs were not parties to the HEW proceeding is similarly no obstacle to an award of fees. In *Sullivan v. Pennsylvania Department of Labor and Industry*, 663 F.2d 443, this court held that where a plaintiff's lawsuit prompted her union to take her case to arbitration against her employer, the plaintiff could be deemed to have prevailed in her Title VII case because of its impact on the relief she obtained in the arbitration proceeding, even though she did not actually prevail in her Title VII case. The plaintiff in *Sullivan* was not a formal party to the arbitration.

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10. Cases prior to *New York Gaslight Club* also generally allowed fees for plaintiffs who prevailed through administrative proceedings. *See, e.g.*, Booker v. Brown, 619 F.2d 57 (10th Cir. 1980) (Title VII); Foster v. Boorstin, 561 F.2d 340 (D.C. Cir. 1977) (Title VII).

> Our decisions have made it clear that a plaintiff can receive attorneys' fees even if the causal link between the civil rights suit and the relief obtained is not as direct as when the case is completely adjudicated in the district court itself or formally settled with the defendants in the context of the civil rights proceeding.
>
> * * *
>
> [T]he union was uncertain as to the merits of her grievance, and had ceased acting on it for a full year pending the outcome of the EEOC proceedings. The EEOC's decision encouraged the union to bring Sullivan's case to arbitration.

663 F.2d at 448, 451. *See also Thomas v. Honeybrook Mines, Inc.*, 428 F.2d 981 (3d Cir. 1970), *cert. denied*, 401 U.S. 911 (1971) (where worker's suit forced union fund trustees to commence action against mine operators which resulted in recovery, workers' counsel fees incurred in bringing about trustees' actions were recoverable).

Similarly, in *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760 (7th Cir. 1982), the Seventh Circuit held that a Title VII plaintiffs' attorney could be compensated for time spent in efforts to persuade the Federal Government to debar the employer from receipt of federal contracts under Executive Order 11246.

> [T]he plaintiffs were carrying out their responsibilities as representatives of the class in doing whatever was necessary to vindicate the rights of the class against the discriminatory employment practices of the defendant. Thus, the district court recognized that the plaintiffs pursued the debarment of the defendant for the purpose of achieving their ultimate goal of relief in the Title VII suit. We do not read *Carey* as precluding an award of fees for such efforts.
>
> * * *

> [The plaintiffs'] efforts to have the defendant debarred from its federal contracts on the basis of the same discrimination charged in the Title VII action were designed to move the Title VII case toward ultimate disposition. This desired effect was achieved, because the threat of debarment on account of discrimination caused the defendant to settle the Title VII action. Thus, the plaintiffs' pursuit of debarment was a service which contributed to the ultimate termination of the Title VII action, and in that sense was within the Title VII action.

Id. at 766, 767 (footnotes omitted).

The fact that the NAACP plaintiffs were not formal parties to the collateral HEW investigation against WMC is irrelevant. *Chrapliwy*, 670 F.2d at 767 n.15. It is also irrelevant that the HEW investigation was not a formal adjudicatory proceeding before the agency. *See id; Sullivan; cf. EEOC v. Safeway Stores, Inc.*, 597 F.2d 251 (10th Cir. 1979) (Title VII proceedings include post-settlement proceedings before special master); *Parker v. Califano*, 561 F.2d 320, 322 n. 7 (D.C. Cir. 1977) (HEW proceedings without formal hearing).

In this circuit, it is established law that plaintiffs must satisfy only two requirements in order to be considered the prevailing party for purposes of a fee award: the plaintiffs must essentially succeed in obtaining some relief on the merits of their claim, and the circumstances under which the plaintiffs obtain that relief must be causally linked to the prosecution of the complaint.[11] *Sullivan*, 663 F.2d at 452.

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11. Silberman v. Bogle, 683 F.2d 62 (3d Cir. 1982), does not dictate a contrary conclusion. In *Silberman*, we affirmed the district court's denial of fees for time and effort by counsel in an SEC proceeding. We held that private attorneys should not be awarded fees on an equitable fund theory, where the SEC had affirmative enforcement obligations, unless they established that but for their participation the benefit to the fund resulting from the SEC ruling would not have occurred. *Silberman* thus establishes a causation test, similar to the one applied in the civil rights context. *See Sulli-*

IV.

On remand, the district court should conduct a hearing on the amount of fees to be awarded. In making its determination, the district court should follow the principle of *Hughes v. Repko*, 578 F.2d 483 (3d Cir. 1978), that

> legal services fairly devoted to successful claims are compensable even though those very same legal services also supported the prosecution of unsuccessful claims.

Id. at 487. The plaintiffs are entitled to recover fees for "all time reasonably spent on a matter." Senate Report at 6. In *Van Davis v. County of Los Angeles*, 8 Empl. Prac. Dec. (CCH) ¶9444 (C.D. Cal. 1974), *cited with approval*, Senate Report at 5, the district court explained:

> It . . . is not legally relevant that plaintiffs' counsel expended a certain limited amount of time pursuing certain issues of fact and law that ultimately did not prevail. . . . [P]laintiffs' counsel are entitled to an award of fees for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter.

Id. at p. 5049.

The district court must be mindful not to separate the issues in a complex piece of civil rights litigation and award fees for only those issues on which the plaintiffs prevailed. *E.g., Jones v. Diamond*, 636 F.2d 1364 (5th Cir.), *cert. dismissed*, 453 U.S. 950 (1981); *Gluck v. American Protection Industries, Inc.*, 619 F.2d 30, 33 (9th Cir. 1980); *Reproductive Health Services v. Free-*

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van, 663 F.2d at 452 (no attorneys' fees where plaintiff, without more, succeeds in collateral proceeding or where there is merely incidental involvement of attorney).

man, 614 F.2d 585, 600 (8th Cir. 1980); *Northcross v. Board of Education of Memphis City Schools*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980); *Brown v. Bathke*, 588 F.2d 634 (8th Cir. 1978).

V.

The judgment of the district court will be reversed and this case remanded for proceedings consistent with this opinion.

POLLAK, *District Judge*, concurring:

In *Sullivan v. Bureau of Vocational Rehabilitation*, 504 F. Supp. 582 (E.D.Pa. 1980), the question presented was whether plaintiff was entitled to an award of attorney's fees. The qustion arose under the following circumstances: Plaintiff, an employee of Pennsylvania's Bureau of Vocational Rehabilitation, had sought promotion to a higher position. When a male fellow-employee was selected to fill the position, plaintiff asked her union to grieve the failure to promote her, contending that the selection of her fellow-employee was an act of sex discrimination violative of the governing collective bargaining agreement. Shortly thereafter, plaintiff, through her own retained counsel, filed a Title VII charge with the EEOC. When the grievance process produced no results, the union decided to delay further action while the

EEOC considered the charge. In due course, the EEOC, assisted by the considerable information assembled by plaintiff's counsel, (a) determined that there was reasonable cause to believe plaintiff's non-promotion violated Title VII, and (b) issued a "right to sue" letter. Plaintiff thereupon filed suit in the district court and, the following month, the union demanded arbitration of plaintiff's claim. The arbitration was handled by union counsel but the union presentation depended heavily not only on the record before the EEOC but on plaintiff's counsel's enterprising pre-trial discovery in the district court. The arbitrator found in the union's favor and plaintiff was ordered reinstated with back pay — a result which mooted all of plaintiff's Title VII prayers for relief except her application for attorney's fees.

Sitting in the district court, I concluded that plaintiff was not entitled to attorney's fees for the reason that the "action or proceeding" in which plaintiff had prevailed was not the title VII suit but an unrelated arbitration proceeding. The decision in *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54 (1980), authorizing an award of attorney's fees where a claimant had prevailed "in *state* administrative and judicial proceedings that Title VII requires federal claimants to invoke," *id.* at 56 (emphasis in original), seemed to me to preclude an award where a claimant had prevailed in a proceeding not part and parcel of the Title VII process.

This court reversed, stating that "the crucial question under sections 706(k) and 1988 is not whether a plaintiff *actually* prevailed in a Title VII or civil rights lawsuit, but whether the plaintiff may be *deemed* to have prevailed in the civil rights action because of the causal connection between the suit filed and the relief obtained." *Sullivan v. Commonwealth of Pennsylvania Department of Labor*, 663 F.2d 443, 450 (1981), *cert. denied*, 455 U.S. ——, 102 S.Ct. 1716 (1982) (emphasis in original).

A case can be made for the proposition that the application for attorney's fees pressed by plaintiffs in the instant case is less warranted than the application sustained in *Sullivan*. Here, as Judge Hunter shows in paragraphs 7 - 12 of his opinion, the single element of relief to which plaintiffs can point — namely, the Supplemental Agreement[1] — was perceived by plaintiffs as a woefully inadequate product of an administrative detour mandated by Chief Judge Latchum in the teeth of plaintiffs' strong objections both before and after the fact. On the other hand, unwelcome as the Supplemental Agreement appeared to plaintiffs at the time, it was achieved as a consequence of this litigation. Thus I conclude that this case, like *Sullivan*, is one in which plaintiffs "may be *deemed* to have prevailed in the civil rights action because of the causal connection between the suit filed and the relief obtained."[2] For these reasons, I join Judge Gibbons' opinion and the judgment of reversal.

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1. I entirely agree with Judges Gibbons and Hunter that the plaintiffs' success in establishing on appeal the doctrinal validity of their private-cause-of-action theory did not itself constitute a substantive victory warranting an award of attorney's fees.

2. Since *Sullivan* was decided by this court only a short time before the entry of the order and opinion here under review, it seems not unlikely that the *Sullivan* decision was not brought to Chief Judge Latchum's attention.

HUNTER, *Circuit Judge*, concurring and dissenting:

1. I concur in the result reached in Part II of the majority opinion, which holds that the district court correctly refused to award attorneys' fees to plaintiffs[1] for establishing a private cause of action under Title VI of the Civil Rights Act of 1964 and Section 504 of the Rehabilitation Act of 1973. The majority holds that "the District Court did not abuse its discretion in refusing to award fees for the plaintiffs' success in securing a private right of action." Typescript p. 10. I, however, base my concurrence on the ground that the district court properly found that the plaintiffs were not "prevailing parties" under the operative statutes.

2. I respectfully dissent from Parts III, IV, and V of the majority opinion. In Part III the majority holds that "the District Court abused its discretion in refusing to find that the plaintiffs prevailed," typescript p. 14-15, in bringing about the Supplemental Agreement. In my view the majority misstates the role of the district court's statutory discretion to award attorneys' fees. Because I find that plaintiffs are not "prevailing parties" in this litigation, I conclude that they are not entitled to attorneys' fees. I would affirm the district court in all respects.

3. The Civil Rights Attorney's Fee Awards Act provides in pertinent part:

> In any civil action or proceeding to enforce . . . title VI of the Civil Rights Act of 1964, the court, *in its discretion*, may allow the *prevailing party*, other than the United States, a reasonable attorney's fee as part of the costs.

42 U.S.C. §1988 (Supp. IV 1980) (emphasis added).

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1. Party designations will follow those used in the majority opinion.

4. Given the wording of the statute,[2] I conclude that the district judge must reach his decision concerning attorney's fees in two stages. First, he must determine whether plaintiff is a "prevailing party" within the meaning of the statute. If the district judge concludes that plaintiff is not a "prevailing party," he has no discretion to award attorney's fees. Second, once the district judge concludes that plaintiff is a "prevailing party," then and only then can he exercise his discretion in deciding whether to award fees and in determining the amount of any such fees.

5. The majority correctly articulates the legal standard in this circuit for determining who is a "prevailing party" under section 1988. To be a "prevailing party," plaintiff first must show that he "essentially succeeded," *Bagby v. Beal*, 606 F.2d 411, 415 (3d Cir. 1979), *Hughes v. Repko*, 578 F.2d 483, 486-87 (3d Cir. 1979), in obtaining some of the benefits that he sought. Second, plaintiff must show a causal connection between his action and the relief obtained. *Sullivan v. Pennsylvania Department of Labor and Industries*, 663 F.2d 443, 447-51 (3d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1716 (1982). Plaintiff can establish this causal link if he can show that his action was a "material contributing factor in bringing about the events that resulted in the obtaining of the desired relief." *Sullivan*, 663 F.2d at 452.

6. Under this standard I fully agree with the district court that plaintiffs are not "prevailing parties." That conclusion, therefore, renders the district judge's denial of fees in this case nondiscretionary.

7. This litigation centers around plaintiffs' attempts to prevent the removal and relocation of certain services

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2. Similar language in the attorney's fee provision of the Rehabilitation Act of 1973, 29 U.S.C. §794a(b) (Supp. II 1978), governs the award of attorney's fees in cases involving the Rehabilitation Act.

of the Wilmington Medical Center (WMC). Plaintiffs alleged that that relocation ("Plan Omega") would discriminate against them because of their race, national origin, or physical handicap in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794. In their original complaint, plaintiffs sought a declaratory judgment that the relocation of WMC's facilities would violate Title VI and Section 504 and a permanent injunction prohibiting WMC's relocation. Defendants in the case were WMC and all parties who had approved Plan Omega without regard to its compliance with Title VI and Section 504. Included as defendants were the Secretary of the United States Department of Health, Education and Welfare (HEW), the Director of the Bureau of Comprehensive Health Planning (BCHP), and the Chairman of the Health Planning Council, Inc.

8. After HEW and BCHP filed various motions to dismiss, the district judge temporarily stayed judicial proceedings and, over plaintiffs' objections, *sua sponte* ordered HEW to conduct an investigation of plaintiffs' allegations. HEW found that the implementation of Plan Omega would be a *prima facie* violation of Title VI and Section 504. After that finding, HEW and WMC voluntarily entered into a binding Contract of Assurances ("Supplemental Agreement") which modified Plan Omega to comply with the statutes.

9. Plaintiffs immediately attacked the legality of the Supplemental Agreement. They amended their complaint to state that WMC and HEW had "further violated Title VI and Section 504 by entering into the Supplemental Agreement. . . ." Second Amended Complaint ¶40, App. at 63. Plaintiffs amended their claim for relief to request a declaratory judgment that the Supplemental Agreement "fails to correct Plan Omega's violation[s]," Second Amended Complaint ¶46(h), App. at 66, and a permanent injunction that "orders the Secretary to rescind his approval of the Supplemental Agreement . . .," Second Amended Complaint ¶47(i), App. at 68.

10. The litigation proceeded as described in the majority opinion and eventually the district court heard the case on the merits. The district court rejected all of plaintiffs' claims that the Supplemental Agreement was discriminatory and entered judgment on the merits against plaintiffs with costs. *NAACP v. WMC, Inc.*, 491 F. Supp. 290 (D. Del. 1980). This Court sitting *en banc* affirmed the holding of the district court in its entirety. *NAACP v. WMC, Inc.*, 657 F.2d 1322 (3d Cir. 1981).

11. Plaintiffs now claim that they are entitled to attorneys' fees from WMC for their efforts leading to the Supplemental Agreement. They claim that they are "prevailing parties" pursuant to section 1988 because the Supplemental Agreement affords them some of the "benefits" that they sought and because they were the "catalysts" prompting the HEW investigation and the Agreement.

12. I would hold that plaintiffs can not satisfy either prong of the "prevailing party" test. Plaintiffs never recognized the Supplemental Agreement as affording them "essential success" on their claims. They vehemently opposed the court-ordered investigation which resulted in the Supplemental Agreement. They contested the Agreement in its entirety, with no effort to insulate from their attack the "benefits" which they now claim to have achieved from the Agreement. Indeed, the district court concluded

> Plaintiffs never wavered through the remainder of this litigation in their contention that Plan Omega as modified by the Supplemental Agreement violated the discrimination statutes involved. . . . None of the relief sought originally or later was ever granted to plaintiffs.

App. at 287-88. I would hold that plaintiffs cannot now, solely for the purpose of obtaining attorneys' fees, claim

benefit from an agreement which they have opposed from its inception.[3]

13. Even assuming arguendo that plaintiffs can claim benefit from the Supplemental Agreement, they nonetheless fail to satisfy the second prong of the test. There is simply no causal connection between the plaintiffs' actions and the alleged "benefits." The majority argues for an "expansive" definition of causation, but even the most liberal definition cannot in my view encompass the actions of the plaintiffs in this case.

14. Whatever "benefits" plaintiffs may have derived resulted from the Supplemental Agreement entered into by co-defendants HEW and WMC after an extensive investigation by HEW. That Supplemental Agreement came about *despite* plaintiffs' opposition to HEW's investigation and *despite* plaintiffs' efforts to rescind the Agreement in its entirety. Although plaintiffs did have some input in the negotiations between HEW and WMC, the district court concluded "based on its exposure to the facts" that any benefit conferred by the Supplemental Agreement was not causally related to the efforts of plaintiffs. App. at 288.

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3. Unlike the present case, the cases cited in the majority opinion in which this Court previously has awarded attorneys' fees have involved clear, uncontested benefits for plaintiffs. For example, in Sullivan v. Pennsylvania Department of Labor and Industries, 663 F.2d 443 (3d Cir. 1981), *cert. denied*, —— U.S. ——, 102 S.Ct. 1716 (1982), plaintiff's Title VII suit prompted her union to arbitrate her grievance. Through the arbitration, plaintiff clearly benefitted in receiving "all the relief she had sought in her Title VII suit except attorneys' fees." *Id.* at 446. In Morrison v. Ayoob, 627 F.2d 669 (3d Cir. 1980) (per curiam), *cert. denied*, 449 U.S. 1102 (1981), plaintiffs sued to compel district justices to cease violating indigents' rights to counsel. Plaintiffs clearly benefitted when defendants voluntarily ceased their objectionable practices. In Bagby v. Beal, 606 F.2d 411 (3d Cir. 1979), plaintiff alleged that her employer violated her constitutional rights in suspending her without sufficient notice in advance of her hearing. She clearly benefitted from the district court's order that she be given a new hearing.

15. Like the district judge, I cannot hold that plaintiffs "caused" benefits to come into being when their only role was vigorously and consistently to seek the rescission of the Agreement from which those benefits came. Further, I cannot hold, as the majority does, that plaintiffs' mere initiation of the lawsuit constitutes sufficient causation, when plaintiffs opposed every step in the litigation that led to the achievement of the alleged "benefits."[4]

16. Because I conclude that plaintiffs are not "prevailing parties," I would affirm the judgment of the district court in all respects.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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4. Again, in previous cases where this Court has awarded fees, the causal link has been clear. For example, in *Sullivan*, 663 F.2d at 451, "the determination that [plaintiff's] lawsuit was a material factor in bringing about her success in the arbitration [was] not contested." Uncertain about the strength of plaintiff's claim, her union had declined to take her case to arbitration until spurred on by her success with the EEOC. *But see* Ross v. Horn, 598 F.2d 1312 (3d Cir. 1979), *cert. denied*, 448 U.S. 906 (1980) (where the Court remanded for a determination of the causation issue because it was unclear from the record whether plaintiff's lawsuit caused the New Jersey Department of Labor to modify its procedures for handling unemployment fraud cases).

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1072

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PUERTO RICAN CIVIL RIGHTS LEAGUE, INC., OLDER AMERICANS COALITION, WILMINGTON UNITED NEIGHBORHOODS, BRANDYWINE TRINITY METHODIST CHURCH, on behalf of their members and others similarly situated, and RAYMOND W. BROWN, MARIA GLAINDEZ, for herself and as parent and guardian for her minor children, Reynaldo Galindez and Pedro Galindez, MILAGRO QUINONES, DENISE SMOKES, on behalf of themselves and others similarly situated; and CITY OF WILMINGTON, a municipal corporation

Appellants

v.

THE WILMINGTON MEDICAL CENTER, INC., and CRAWFORD H. GREENWALT, as Chairman of the Board of Trustees, and JOSEPH A. DALLAS, as Chairman of the Board of Directors

(D.C. Civil No. 76-0298)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Submitted: July 29, 1982

Before: GIBBONS and HUNTER, *Circuit Judges*
and POLLAK, *District Judge**

(Opinion Filed September 20, 1982)

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*Hon. Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

ORDER AMENDING OPINION

Part IV of the slip opinion in the above matter is hereby amended to read in its entirety as follows:

IV.

On remand, it will be incumbent on the district court to determine a reasonable fee for "all time reasonably spent," Senate Report at 6, by counsel for the NAACP plaintiffs on those phases of the case which culminated, on November 1, 1977, in the Supplemental Agreement.

JOHN J. GIBBONS
Circuit Judge

DATED: September 29, 1982

A True Copy:
Teste:

Clerk of the United States Court of Appeals for the Third Circuit

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 76-298
THE WILMINGTON MEDICAL CENTER, INC., et al.,	)	
Defendants.	)	

Maryilyn G. Rose and Sanford A. Newman of the Center for Law and Social Policy, Washington, D.C., Douglas Shachtman, Wilmington, Del., and Jeffrey S. Goddess, City Solicitor of the City of Wilmington, Wilmington, Del., for plaintiffs.

Rodney M. Layton and William J. Wade of Richards, Layton & Finger, Wilmington, Del., for defendant Wilmington Medical Center, Inc.

O P I N I O N

Wilmington, Delaware
December 21, 1981

LATCHUM, Chief Judge.

Two matters are presently before the court in this protracted litigation:[1] (1) plaintiff's petition for an award of attorneys' fees and incidental legal expenses pursuant to the provisions of 42 U.S.C. § 1988 and 29 U.S.C. § 794a(a)(2)(b),[2] and (2) the motion of the defendant Wilmington Medical Center,

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[1]Ten prior reported opinions in this controversy are: NAACP v. WMC, Inc., 426 F.Supp. 919 (D.Del.1977); NAACP v. WMC, Inc., 436 F.Supp. 1194 (D.Del.1977), aff'd, 584 F.2d 619 (C.A.3, 1978); NAACP v. WMC, Inc., 453 F.Supp., 280 (D.Del.1978), rev'd in part, 599 F.2d 1247 (C.A.3, 1979); NAACP v. WMC, Inc., 453 F.Supp. 330 (D.Del.1978); Wilmington United Neighborhoods v. HEW, 458 F.Supp. 628 (D.Del.1978), aff'd, 615 F.2d 112 (C.A.3, 1980); NAACP v. WMC, Inc., 491 F.Supp. 290 (D.Del.1980); aff'd, 657 F.2d 1322 (1981).

[2]Docket Item ("D.I.") 425.

Inc. ("WMC") for review of the taxation of costs.[3]

I. PROCEDURAL HISTORY

In order to understand fully the attorney fee issue now before the Court and to highlight the claims asserted, the relief sought, and the ultimate disposition of those claims on the merits, it is necssary to recite in some detail the procedural history of this intricate litigation.

This litigation grew out of "Plan Omega," the proposal of the WMC to relocate a major portion of its urban hospital facilities and services to a suburban location. Certain black, Puerto Rican and handicapped individuals and groups representing similar persons ("the plaintiffs") commenced this action on Septem-

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[3]D.I. 451.

ber 10, 1976, naming as defendant WMC, the Secretary of the Department of Health, Education and Welfare ("HEW"), the Director of the [Delaware] Bureau of Comprehensive Health Planning ("BCHP"), and the Chairman of the Health Planning Council, Inc. ("HPC").

The original complaint alleged that WMC, as a recipient of federal funds under the medicare and medicaid programs, had violated its obligations to the plaintiffs, beneficiaries of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, by commencing to implement Plan Omega.[4] Plaintiffs also alleged that HEW had violated its duty to enforce Title VI and Section 504: (1) by approving Plan Omega

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[4] D.I. 1.

under Section 1122 of the Social Security Act, 42 U.S.C. § 1320a-1 ("Section 1122"); (2) by approving regulations under the Social Security Act which failed to require that a proposal under Section 1122 comply with Title VI and Section 504; (3) by entering into an agreement with BCHP which failed to ensure that proposals under Section 1122 comply with Title VI and Section 504; (4) by adopting a procedure which prohibited HEW review of Section 1122 proposals for substantive compliance with Title VI and Section 504; (5) by following such an improper procedure in approving Plan Omega; and (6) by failing to file an environmental impact statement concerning Plan Omega under the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 et seq. (the "NEPA claim").[5] Finally, the complaint charged

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[5] D.I. 1, ¶30.

that BCHP and HPC had violated Title VI and Section 504 by not adopting procedures to ensure that proposals under Section 1122 comply with Title VI and Section 504 and by making findings and recommending approval of Plan Omega.[6]

The relief sought by the complaint was a judgment: (1) that declares the defendants had violated the above statutes and failed to perform their statutory duties as alleged in various claims outlined above; and (2) that enjoins the implementation of Plan Omega and the relocation of a portion of WMC's facilities.

Plaintiffs filed a first amended complaint which clarified the claims against HEW on December, 12, 1976.[7] The

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[6] D.I. 1, ¶31.

[7] D.I. 52 & 75.

first substantive motions which the Court was required to decide were: (a) HEW's motion to dismiss or, alternatively, for summary judgment;[8] (b) BCHP's motion to dismiss[9] on the grounds that the plaintiffs had failed to exhaust their administrative remedies; and (c) plaintiffs' cross motion for partial summary judgment against HEW.[10] WMC took no part in briefing these motions to dismiss and/or summary judgment. NAACP v. WMC, Inc., 426 F.Supp. 919, 923 (D.Del.1977). Indeed, WMC's counsel had from the beginning of the litigation sought to have the discrimination claims against WMC determined by this Court at the earliest possible time and to this end on

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[8] D.I. 23.

[9] D.I. 9.

[10] D.I. 53.

November 3, 1976, had moved the Court for a separate trial of the discrimination claims asserted against WMC.[11] At the argument of the cross motions of HEW and plaintiffs on January 6, 1977, WMC's counsel did not support HEW's motion to have the action dismissed for failure to exhaust administrative remedies.[12]

Over the strenuous objections of the plaintiffs,[13] the Court, sua sponte, on January 19, 1977 stayed its actions temporarily on the amended complaint and ordered HEW to conduct a civil rights investigation of plaintiffs' discrimination allegations and to reconsider its posi-

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[11] D.I. 22; however, plaintiffs opposed WMC's motion for a separate trial (D.I. 286) and the motion was thereafter denied by the Court on November 11, 1976. (D.I. 31.)

[12] D.I. 72, p.70.

[13] D.I. 62, pp. 59-61; D.I. 63, p. 93; D.I. 72, pp. 46-54.

tion regarding a NEPA report. 426 F.Supp. 919 (D.Del.1977). That investigation led to a finding by HEW's Office of Civil Rights in July, 1977 that the implementation of Plan Omega, as presently conceived, would constitute a prima facie violation of Title VI and Section 504.[14] HEW also found that, by giving specific assurances in certain areas, WMC could bring Plan Omega into compliance with both statutes.[15] HEW further concluded a NEPA report was unnecessary in Section 1122 review.[16] After several weeks of negotiations between HEW and WMC, as provided in 42 U.S.C. § 2000d-1, WMC on November 1, 1977 voluntarily entered into

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[14] D.I. 124.

[15] Id.

[16] Id.

a Contract of Assurances ("Supplemental Agreement") with HEW in which WMC undertook specifically, inter alia: (1) to provide a transportation system for patients, visitors and employees between the Delaware Division and the Southwest Division; (2) to institute a patient allocation system as to services available at both locations to preclude the development of racially differentiated utilization patterns; and (3) to alter construction plans for both facilities to comply with Section 504 requirements.[17]

On August 16, 1977 the Court ruled against the plaintiffs and determined that HEW was not required to prepare a NEPA report with respect to HEW's Section 1122 review of Plan Omega. NAACP v. WMC, Inc., 436 F.Supp. 1194 (D.Del.1977) and the Court of Appeals for the Third Circuit

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[17] D.I. 169.

affirmed that decision in 584 F.2d 619 (C.A.3, 1978).

After WMC and HEW entered into the Supplemental Agreement, the plaintiffs filed a second amended complaint which added claims against HEW, challenging the legality of the Supplemental Agreement, and claimed that WMC violated Title VI and Section 504 by voluntarily entering into the Supplemental Agreement.[18] In an opinion filed on April 7, 1978, this Court reviewed HEW's finding and held: (1) that HEW's conclusions, that Plan Omega as modified by the Supplemental Agreement would not violate Title VI or Section 504, were not arbitary or capricious; (2) that the plaintiffs had no right to bring a private action under those statutes; and (3) summary judgment would be entered in

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[18] D.I. 197.

favor of HEW and WMC. NAACP v. WMC, Inc., 453 F.Supp. 280 (D.Del.1978). On appeal, the Third Circuit on June 4, 1979 reversed in part, holding that the plaintiffs did have a private right to a trial de novo in this Court on their Title VI and Section 504 claims, and remanded the case to this Court for a trial on the merits. NAACP v. WMC, Inc., 599 F.2d 1247 (C.A.3, 1979).

On June 21, 1978, this Court handed down another opinion, NAACP v. WMC, Inc., 453 F.Supp. 330 (D.Del.1978), which rejected the plaintiffs' claims that HEW's failure to provide the plaintiffs a hearing during its administrative investigation of possible Title VI and Section 504 violations contravened the due process clause of the Fifth Amendment. These due process claims were first raised by the plaintiffs in their

second amended complaint filed November 22, 1977.[19] Although both the June 21 and April 7 district court opinions were appealed to the Third Circuit together, the Court of Appeals, because of its finding that the plaintiffs had a right to a trial de novo under Title VI and Section 504, found it unnecessary to decide the due process issue.

In a later opinion released on September 22, 1978 in two different but intimately related cases litigated by the same attorneys, this Court also rejected on the merits plaintiffs' various challenges to HEW's approval of Plan Omega under Section 1122. Wilmington United Neighborhoods v. HEW etc., 458 F.Supp. 628 (D.Del.1978). Again this opinion was

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[19] D.I. 197.

affirmed by the Court of Appeals. 615 F.2d 112 (C.A.3, 1980).

Following the remand of this case by the Third Circuit for a trial de novo, HEW was dismissed from the action on July 16, 1979 in accordance with the mandate of the Court of Appeals[20] and BCHP and HPC and their respective officers were dismissed from this action by agreement of the parties on July 17, 1979.[21]

Then on September 4, 1979, this court granted plaintiffs leave to file a third amended complaint.[22] This amendment added the City of Wilmington as a party plaintiff and struck those paragraphs relating to HEW in the complaint. Also added were allegations of violations of

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[20] D.I. 293.

[21] D.I. 294.

[22] D.I. 345.

the Age Discrimination Act of 1975, 42 U.S.C. § 6102 ("Section 6102 claims") and an allegation charging WMC with "intending" the disciminatory consequences alleged under Title VI, Section 504 and Section 6102. After a bench trial lasting more than a month, this Court filed a comprehensive and detailed opinion, concluding that the plaintiffs had failed to prove discrimination under any of the three statutes on any of the claims asserted in the third amended complaint. NAACP v. WMC, Inc., 491 F.Supp. 290 (D.Del.1980). Consequently, final judgment was entered on May 13, 1980 in favor of WMC and against the plaintiffs together with costs.[23] The Court of Appeals

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[23] D.I. 417.

for the Third Circuit, sitting in banc, affirmed the judgment in whole on June 29, 1981. NAACP v. WMC, Inc., 657 F.2d 1322 (C.A.3, 1981).

II. PLAINTIFFS' FEE APPLICATION

As near as the Court can ascertain from plaintiffs' attorney's fees and legal expense application filed on November 3, 1980,[24] and as supplemented on April 30, 1981,[25] plaintiffs seek attorney's fees in the amount of $13,390.73 and legal expenses in the sum of $8,491.62.[26]

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[24] D.I. 425, 427, 428, 429 & 430.

[25] D.I. 441.

[26] The fee application by its terms does not preclude plaintiffs from applying for alleged additional fees and expenses (D.I. 425, p. 2, footnotes) although no other applications other than those filed on November 3, 1980 and April 30, 1981 have been filed.

Plaintiffs base an award of fees upon the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. 1988, and the 1978 amendments to the Rehabilitation Act, 29, U.S.C. § 794a(b).[27]

42 U.S.C. § 1988 in pertinent part reads:

> [I]n any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.[28]

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[27]The fee application did not request an award based on the Age Discrimination Act of 1975. 42 U.S.C. § 6102.

[28]The Third Circuit Court has held that the phrase "by or on behalf of the United States of America" was meant to modify only the phrase "to enforce, or charging a violation of, a provision of the United States Internal Revenue Code," and not

[Footnote continued on following page]

The attorney fee award provisions of the 1978 Amendments to the Rehabilitation Act track the language of the Civil Rights Attorney's Fee Awards Act.[29]

The Court of Appeals for the Third Circuit in Hughes v. Repko, 578 F.2d 483 (C.A.3, 1978) laid down the basic rules for determining a "prevailing party." It stated:

[Footnote continued from previous page]

the phrase "or Title VI of the Civil Rights Act of 1964." Shannon v. United States Department of Housing and Urban Development, 577 F.2d 854, 855 n.2 (C.A.3), cert. denied, 439 U.S. 1002, 99 S.Ct. 611, 58 L.Ed.2d 677 (1978); see also NAACP v. WMC, Inc., 599 F.2d 1247, 1255 (C.A.3, 1979).

[29] 29 U.S.C. § 794a(b) reads in part:

> In any action or proceeding to enforce or charge a violation of provision [of the Rehabilitation Act], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorneys' fee as part of the costs ....

> In order to apply the "prevailing party" language of the statute fairly, we think district courts should analyze the results obtained by the petitioning party on particular claims, regardless of the number of parties. Thus, in the context of an award sought after the entry of final order, a prevailing party on a particular claim is one who fairly can be found by the district court to have essentially succeeded on such a claim, as "claim" is used in Fed.R.Civ.P. 10(b).
>
> * * * * * *
>
> It is clear to us that the fee-petitioner cannot be treated as a prevailing party to the extent he has been unsuccessful in asserting a claim.

578 F.2d 486-87.

Again in Bagby v. Beal, 606 F.2d 411 (C.A.3, 1979), the Third Circuit referring to the above quotation in Hughes v. Repko, supra, stated:

> This definition [in Repko] focuses not on the substantive merits of plaintiff's claims, but rather on the relief ultimately received by the plaintiff.

606 F.2d 415.

Applying the principles of the Hughes and Bagby decisions to the procedural history of this litigation cited in detail above, it is clear that the plaintiffs did not succeed on the merits of any of the discrimination claims asserted against WMC nor did they obtain any of the relief sought against WMC. In these circumstances plaintiffs cannot be considered the prevailing parties with respect to WMC within the meaning of 42 U.S.C. § 1988 or 29 U.S.C. § 794a(b). Nevertheless, the plaintiffs advance two contentions which they argue justify an award of attorney's fees to them against WMC. First, plaintiffs contend that they are entitled to an award of attorney's fees from WMC because they established in the Court of Appeals their right to assert a private right of action to enforce the obligations of WMC to them under Title VI

and Section 504. NAACP v. WMC, Inc., 599 F.2d 1247, 1259 (C.A.3, 1979).

Of course, obtaining the ruling on appeal that plaintiffs had a private cause of action and that the case would be remanded for a de novo trial on the merits was a procedural victory. However, it did nothing to advance the plaintiffs' claims for relief because the plaintiffs were no closer to a judgment on the merits of their discrimination claims against WMC than they were before the appeal was taken. Thus, plaintiffs did not prevail on the merits of their discrimination claims against WMC since the Court of Appeals held only that the plaintiffs were entitled to a de novo trial on the merits of their cause in the district court. Hanrahan v. Hampton, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980);

Swietlowich v. County of Bucks, 620 F.2d 33, 34 (C.A.3, 1980).[30]

To the same effect is Bly v. McLeod, 65 F.2d 134 (C.A.4, 1979) cited with approval both in Hanrahan and Swietlowich. In the Bly case the Court found that the plaintiffs were not prevailing parties even though they claimed certain procedural victories, including a judgment in the Court of Appeals vacating the district court's dismissal of the action. In denying attorney's fees, the Court said if the plaintiffs had ultimately lost on the merits, their procedural success

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[30] In Hanrahan v. Hampton, 446 U.S. 754, 100 S.Ct. 1987, 64 L.Ed.2d 670 (1980), the district court had directed verdicts against the plaintiffs and the Court of Appeals reversed and remanded for a new trial. In Swietlowich v. County of Bucks, 620 F.2d 33, 35 (C.A.3, 1980), judgment had been entered in the district court in

[Footnote continued on following page]

would not entitle them to a fee award because "in order to recover attorney fees and costs, plaintiffs must show at least some success on the merits." 605 F.2d at 137.

As it turned out after the de novo trial following remand of the instant action, plaintiffs were wholly unsuccessful on their claims against WMC and obtained none of the declaratory or injunctive relief that they sought. Under no stretch of the imagination can it be said that plaintiffs became prevailing parties for the purpose of shifting counsel fees

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[Footnote continued from previous page]

defendant's favor but on appeal that judgment was vacated because of error in the jury instructions and the case remanded for a new trial. In both cases, the courts held that plaintiffs were not prevailing parties in obtaining a remand for a new trial within the meaning of the fee award act.

to WMC under the fee award acts on the basis of a remand for a new trial.[31] Thus, the Court finds no merit to plaintiffs' first contention.

Plaintiffs' second argument in justification of an award of attorney's fees

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[31]The cases relied upon by the plaintiffs are inapplicable to the present case. In each of those cases the plaintiff was found to have "prevailed" on the merits of the civil rights claims asserted and obtained some of the relief requested. For example, in Maher v. Gayne, 448 U.S. 122, 100 S.Ct. 2570, 65 L.Ed.2d 653 (1980), plaintiffs through a settlement of the case obtained a "consent decree" and "won substantially all the relief originally sought in her complaint." Id. at 127, 100 SCt. at 2574. In Bonnes v. Long, 599 F.2d 1316 (C.A.4, 979), plaintiff again obtained a judgment significantly expanding their access to prison library facilities and the court stated that on this issue plaintiffs were entitled to attorney fees. All of these cases are in contrast to the instant litigation where the plaintiffs neither succeeded on any of their claims nor obtained any of the relief sought.

against WMC is based on the contention that it was the filing of their action which prompted this Court to direct HEW to conduct an investigation to determine whether Plan Omega violated Title VI or Section 504. 426 F.Supp. 919. Thus, plaintiffs say that, when HEW conducted its civil rights investigation and found the original Plan Omega to be in prima facie violation of both statutes, causing HEW and WMC to execute voluntarily the supplemental agreement to Plan Omega, plaintiffs became entitled to attorney's fees as their suit acted as a catalyst for the changes to the original Plan Omega. Or as otherwise argued, plaintiffs are entitled to attorney's fees for "all work on the civil rights causes which led to,

contributed to, and resulted in the supplemental agreement.[32]

It is true that a plaintiff may be considered a prevailing party under the fee award statutes if he is able to demonstrate both that a defendant voluntarily changed its conduct or position to provide much of the relief sought and that such changes were materially caused by, or were implemented as a direct result of, his lawsuit. Morrison v. Ayoob, 627 F.2d 669 (C.A.3, 1980); Ross v. Horn, 598 F.2d 1312, 1321-22 (C.A.3, 1979). This principle, however, is not applicable to this case. The mere filing of plaintiffs' complaint did not ipso facto prompt the Court to refer the matter to HEW for a civil rights investigation. Rather, the catalyst which

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[32] D.I. 426, p. 8.

materially persuaded this Court to direct HEW to conduct a civil rights investigation were the motions filed by HEW and BCHP. It will be recalled from the procedural history of this case that HEW moved to dismiss the complaint as to it, or alternatively for summary judgment,[33] and that BCHP also moved to dismiss[34] as to it on the ground that the plaintiffs had failed to exhaust their administrative remedies. Plaintiffs, in response, moved for partial summary judgment against HEW. 426 F.Supp at 923. WMC did not participate in the briefing of these issues. 426 F.Supp. 919, 923. Indeed, when WMC's attorney was asked by the Court its position, it was clear that WMC did

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[33] D.I. 23.

[34] D.I. 9.

not support HEW or BCHP's motion to dismiss the case. WMC hoped that the case could "go promptly to trial in order to persuade this Court that there was no discriminatory effect, let alone intent."[35] On the other hand, plaintiffs strenuously argued against HEW's and BCHP's motion to dismiss for failure to exhaust administrative remedies and supported their intentional bypass of the administrative process on the ground that their efforts would have been futile. To support this contention, the plaintiffs created a record to show that HEW lacked the personnel resources to process Title VI and Section 504 complaints.[36] 426

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[35] D.I. 72, p. 70.

[36] E.g, D.I. 62, pp. 59-61; D.I. 63, p. 93.

F.Supp. at 924. This position is also revealed in the argument of plaintiffs' counsel on December 28, 1977:

> The third major defect - in fact it is the defect that goes to the heart of everything we have said today. It goes to the heart of everything we have said since last January when we told the Court we did not want the case to be in any way remanded to HEW. HEW would not conduct a full investigation. They would not conduct a competent investigation, that it didn't have the resources. And, if Your Honor recalls, I think I was in a bit of, probably, a yelling con test with Miss Nadoff, who is the regional attorney, when the Court asked us to come into chambers to discuss whether the case should be sent to HEW, and I took a very strong position. Plaintiffs wanted to try this case before this Court.

D.I. 321, pp. 59-60; see D.I. 217 at 88.

It would be most illogical to saddle WMC with attorney's fees for the extensive work of plaintiffs in resisting the motion of HEW and BCHP and the Court's direction to HEW to conduct an adminis-

trative review when WMC did not participate in the briefing of these issues at all. Thus, it cannot be said that plaintiffs prevailed over WMC on this phase of the litigation.

After the Court directed HEW, if able, to conduct an administrative civil rights investigation over the strong objection of plaintiffs and the wishes of WMC, HEW found that the original Plan Omega as then conceived would constitute a prima facie violation[37] of Title VI and Section 504. HEW also found that WMC

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[37] A prima facie case raises an inference of discrimination only because it is presumed that acts, if otherwise unexplained, are more likely than not based on impermissible factors. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 254, 101 S.Ct. 1089, 1094 67 L.Ed.2d 207 (1981); Whack v. Peabody & Wind Engineering Co., 595 F.2d 190, 193 (C.A.3, 1979).

could bring Plan Omega into compliance with both statutes with specific assurances in certain areas.[38] There is no question that the Supplemental Agreement subsequently negotiated between HEW and WMC was more specific in its assurance that the general assurance of non-discrimination which WMC had given in the past as a recipient of medicare and medicaid funding.

Immediately following the modification of Plan Omega by the Supplemental Agreement, the plaintiffs amended their complaint to attack Plan Omega as so

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[38] D.I. 124; of course, neither this Court nor any other court passed on the legality of the original Plan Omega because WMC and HEW under the statute and regulations voluntarily negotiated a supplemental agreement which gave specific assurances in the areas which HEW believed were necessary to bring Plan Omega into compliance. (D.I. 1969.)

modified.[39] Plaintiffs never wavered throughout the remainder of this litigation in their contention that Plan Omega as modified by the Supplemental Agreement violated the discrimination statutes involved. Of course, plaintiffs were not either intermediately or ultimately successful on that issue. None of the relief sought originally or later was ever granted to plaintiffs. Thus, the plain- tiffs have challenged HEW findings and the Supplemental Agreement as violative of Title VI and Section 504 and having had final judgment entered against them, it would be a most anomalous situation to hold that the plaintiffs prevailed over WMC when HEW and WMC entered into the supplemental agreement.

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[39] D.I. 197.

The Court specifically rejects plaintiffs' argument, moreover, that the Supplemental Agreement and the assurances contained therein were benefits sought by the plaintiffs and that, consequently, they were the catalysts for the modifications made in Plan Omega. The plaintiffs were not parties to HEW administrative investigation and the negotations which followed. While they did have some input into these proceedings, the Court is convinced, based on its exposure to the facts and law of this case as it developed, that any benefit conferred by the Supplemental Agreement were not casually related to plaintiffs' efforts, but were instead the result of HEW and WMC's independent efforts. The plaintiffs cannot, under any circumstances, be considered as essentially succeeding on the merits of their

claims or obtaining the declaratory or injunctive relief which they sought throughout this case - that is, that Plan Omega as modified would discriminate against the poor, the elderly and handicapped.

But even if the Court were to determine (which it has not) that the plaintiffs were in some way instrumental in HEW and WMC entering into the Supplemental Agreement, the Court would still find that the plaintiffs, under the law of this Circuit, have failed to meet their burden of persuasion on the issue of the fees to be awarded. Plaintiffs concede that "only work performed in support of the claims upon which he prevailed shall be included" in a fee application.[40] Hughes v. Repko, 578 F.2d

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[40] D.I. 426, p. 27.

483, 498 (C.A.3, 1978); Baughman v. Wilson Frieght Forwarding Co., 583 F.2d 1208, 1214 (C.A.3, 1978). Despite the recognition of this principle, plaintiffs' application covers virtually all the hours devoted to the case from the time the complaint was filed on September 6, 1976 through the second appeal to the Third Circuit on January 10, 1979,[41] based on the general statement that all such work served as a catalyst for, led to, or resulted in the two areas which they claimed to have prevailed. However, the plaintiffs have made no serious effort in their fee application and supporting affidavits to demonstrate -

> ... the number of hours attributable to the successful claim, and also to demonstrate the number of hours so attributable was reasonably necessary to perform the work at issue.

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[41] D.I. 425; see 599 F.2d 1247.

Hughes v. Repko, supra, 578 F.2d at 487.

Rather than follow this admonition, the plaintiffs claim hours of work related to the dismissal motions of HEW and BCHP on matters relating to the litigation strategy of the government defendants in this case. The court is aware that many hours claimed related entirely to matters unrelated to WMC and had nothing to do with the benefits now claimed by plaintiffs. The Court concludes that plaintiffs have failed to analyze fairly the times they contributed anything of value to HEW during its administrative investigation.

Therefore, the Court finds and concludes that the plaintiffs were not prevailing parties under the fee statutes asserted and are not entitled to an award of attorney fees. Furthermore, even if it conceivably can be thought that some of

plaintiffs' work benefited the plaintiffs, their hours have not been sufficiently analyzed to justify this Court in making such an award.

III. WMC'S MOTION TO REVIEW TAXATION OF COSTS

On May 13, 1980, the Court entered final judgment in this case in favor of WMC and against the plaintiffs together with costs.[42] On June 29, 1981, the Court of Appeals for the Third Circuit sittng in banc affirmed this Court's final judgment, 657 F.2d at 1338, and its mandate taxed the cost of appeal against the appellants (planintiffs).[43] The Clerk

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[42] D.I. 417; on May 23, 1980, the Court denied plaintiffs' motion to amend the final judgment to relieve the plaintiffs of the taxation of costs. D.I. 419.

[43] D.I. 443.

of this Court on September 1, 1981, after considering WMC's bill of costs[44] and plaintiffs' objections thereto,[45] taxed the sum of $6,033.50 as costs against the plaintiffs.[46]

A. Expert Witness Fees and Expenses.

WMC first asks the Court to review the Clerk's denial of the taxation of costs in the amount of $48,823.26 for expert witness fees, travel and expenses.[47] The allowance of expert

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[44] D.I. 444.

[45] D.I. 445 and 449.

[46] D.I. 450.

[47] The amounts requested are: W. Glenn Cannon of Coopers & Lybrand $16,920.00 (witness fees); Donald Velsey of Metcalf & Associates $11,340.16 (witness fees) and $824.14 (expenses); Richard Coffey and Dr. Darrell Thorpe of Chi Systems $13,268.76 (witness fees) and $3,779.20 (expenses); Dr. Richard Schwartz $1,200.00 (witness fees) and $491.10 (expenses).

witness fees and expenses greater than permitted by 28 U.S.C. §1821 may be granted in the sparing discretion of the trial judge if the testimony played a crucial role in the resolution of the issues presented. Local Rule 6.1B(4); Roberts v. S.S. Kyriakoula D. Lemos, 651 F.2d 201 (C.A.3, 1981). While testimony of these witnesses was helpful to the Court, it cannot hold that their testimony was crucial or indispensible to the determination of this case. Furthermore, the Court is without a factual foundation for determining the reasonableness of such fees and expenses. On their face they appear excessive. In any event, this Court will affirm the Clerk's disallowance of the $48,823.26 for expert witness fees, travel and expenses. The Court, however, will allow

the statutory per diem witness fee for the following trial witnesses: W. Glenn Cannon ($30.00), Dr. Darrell Thorpe ($30.00), Thomas Barnes ($30.00), and Nick Mavromatis[48] ($30.00), for a total of $210.00. In addition, the statutory per diem witness fee will be allowed the following deposition witness: Thomas Barnes ($30.00), W. Glenn Cannon ($30.00), Donald Velsey ($120.00), George Gerber ($30.00), Alistair Law ($30.00), for a total of $240.00.

B. Statutory Witness Fees.

WMC has also requested statutory per diem fees for James P. Tyler for 18 days

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[48]Originally expert witness fees were requested for Thomas Barnes and Nick Mavromatis but this request was withdrawn in the motion for review of costs (D.I. 451, pp. 4-5).

of trial and for Oliver Deehan for 20 days of trial when they were present in court but did not testify.[49] Witness fees are not limited to the day a witness tesifies but may include those days in which the witness necessarily attends trial. See 6 Moore's Federal Practice ¶54.77[5.-1] at 1728-29 (and case collected in n.10). The Court finds that it was reasonably necessary for Messrs. Tyler and Deehan, the two witnesses who had lived with the development of Plan Omega from the beginning, to attend trial to hear the development of plaintiffs' case in order to be able to meet plaintiffs' case in chief.[50] Because of the complicated

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[49]The Clerk allowed WMC statutory per diem fees for 5 days that Mr. Tyler testified and for 3 days that Mr. Deehan testified.

[50]D.I. 359, pp. 41-45.

nature of the issues raised by the plaintiffs who had not fleshed-out this trial testimony beforehand, the Court finds that it was reasonably necessary for these two witnesses to attend each day of trial and the statutory per diem witness fee in the additional amount of $1,140.00 will be allowed.

C. Deposition Costs.

Finally, the Clerks' denial of the costs of deposition transcripts in the amount of $3,882.50 is affirmed for the reasons given by the Clerk of Court.

The above shall consitute the Court's finding of fact and conclusions of law and an order will be entered in accordance with this opinion.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	)	
Plaintiffs,	)	
v.	)	C.A. No. 76-298
THE WILMINGTON MEDICAL CENTER, INC., et al.,	)	
Defendants.	)	

ORDER

For the reasons set forth in the Court's opinion entered in this case on this date, it is

ORDERED:

1. Plaintiffs' motion for an award of attorney's fees and expenses is hereby denied.

2. Costs are hereby taxed in favor of the defendant, Wilmington Medical

Center, Inc., and against the plaintiffs in the amount of $7,623.50.

Dated: December 21, 1981.

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Chief Judge

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 82-1072

NATIONAL ASSOCIATON FOR THE ADVANCEMENT OF COLORED PEOPLE, PUERTO RICAN CIVIL RIGHTS LEAGUE, INC., OLDER AMERICANS COALITION, WILMINGTON UNITED NEIGHBORHOODS, BRANDYWINE TRINITY METHODIST CHURCH, on behalf of their members and others similarly situated, and RAYMOND W. BROWN, MARIA GALINDEZ, for herself and as parent and guardian for her minor children Reynaldo Galindez and Pedro Galindez, MILAGRO QUINONES, DENISE SMOKES, on behalf of themselves and others similarly situated; and CITY OF WILMINGTON, a municipal corporation,

Appellants

vs.

THE WILMINGTON MEDICAL CENTER, INC., and CRAWFORD H. GREENWALT, as Chairman of the Board of Trustees, and JOSEPH A. DALLAS, as Chairman of the Board of Directors

(D.C. Civil No. 76-0298)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: GIBBONS and HUNTER, Circuit Judges; and POLLAK, District Judge.*

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*Honorable Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was submitted under Third Circuit Rule 12(6) on July 29, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of the said District Court, entered December 21, 1981, be, and the same is hereby reversed and the cause remanded for proceedings consistent with the opinion of this Court. Costs taxed against appellees.

ATTEST:

Clerk

September 20, 1982

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-1072

NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, PUERTO RICAN CIVIL RIGHTS LEAGUE, INC., OLDER AMERICANS COALITION, WILMINGTON UNITED NEIGHBORHOODS, BRANDYWINE TRINITY METHODIST CHURCH, on behalf of their members and others similarly situated, and RAYMOND W. BROWN, MARCIA GLAINDEZ, for herself and as parent and guardian for her minor children, Reynaldo Galindez and Pedro Galindez, MILAGRO QUINONES, DENISE SMOKES, on behalf of themselves and others similarly situated; and CITY OF WILMINGTON, a municipal corporation,

Appellants

v.

THE WILMINGTON MEDICAL CENTER, INC. and CRAWFORD H. GREENWALT, as Chairman of the Board of Trustees, and JOSEPH A. DALLAS, as Chairman of the Board of Directors

(D.C. Civil No. 76-0298)

SUR PETITION FOR REHEARING

Present: ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges* and POLLAK, *District Judge**

The petition for rehearing filed by appellees in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular

*Hon. Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, as to panel rehearing only.

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

JOHN J. GIBBONS

Judge

Dated: November 8, 1982

Statement by Judge Adams sur denial of the petition for rehearing, with whom Judges Weis and Garth join:

In *Aleyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975), the Supreme Court made it clear that a federal court cannot award a counsel fee absent specific statutory authorization. In response to this holding, Congress enacted the Civil Rights Attorney's Fee Award Act, 42 U.S.C. §1988, which provides "that the federal court, in its discretion, may allow the prevailing party a reasonable attorney's fee" in various civil rights cases.

The legislative history of the Fee Award Act indicates that "parties may be considered to have prevailed when they have vindicated rights through a consent judgment or without formally obtaining relief." Thus, a litigant may be considered to be a prevailing party if the law suit successfully terminates by a consent decree, an out-of-court settlement, a voluntary cessation of an unlawful practice by the defendant, or some other disposition of the case after the plaintiff has vindicated his rights.

Although the concept of "prevailing party" is usually understood to be the party who has won the controversy, the courts have held that it is not necessary for a

plaintiff to prevail on each and every claim asserted or to receive all the relief requested in order to be awarded an attorney's fee under the statute. The party seeking an attorney's fee must, however, demonstrate that, because of his efforts in the litigation, he has obtained at least some of the legal relief he sought. As this Circuit has phrased the test, a party has prevailed if he "essentially succeeds in obtaining the relief he seeks in his claims on the merits." *Bagby v. Beal*, 606 F.2d 411, 415 (3d Cir. 1979). Other courts have stated that a party has prevailed if the "law suit was a significant catalytic factor in achieving the primary relief sought through litigation despite failure to obtain formal judicial relief." *Iranian Students v. Sawyer*, 639 F.2d 1160, 1163 (5th Cir. 1981). On the other hand, the Supreme Court has made it clear that mere procedural victories do not make the plaintiff a prevailing party under the statute and thus are insufficient to justify the award of attorneys' fees. *Hanrahan v. Hampton*, 446 U.S. at 757 (1980).

In the dispute at issue here, the plaintiffs originally claimed that the Wilmington Medical Center had discriminated against minorities and aged persons in its proposal to modernize its facilities. The district court, sitting without a jury, held that there was no proof of discrimination and found for the defendants. This Court affirmed in an in banc decision. In the course of the litigation, the district court *sua sponte* directed the Department of Health, Education and Welfare to conduct an investigation into the plaintiffs' allegations. After the investigation, HEW and the Medical Center voluntarily entered into a contract of assurances which modified the Medical Center's original rehabilitation plan. The plaintiffs did not petition for, cooperate with, or approve of the district court's directive. Indeed, they vigorously opposed the agreement, claiming that it was illegal, and that the making of such an agreement was itself a further violation of the Civil Rights Act. The district court specifically rejected these contentions, finding that the supplemental agreement did not violate the Civil Rights

Act. In addition, it made a finding that "any benefits covered by the agreement were not causally related to the efforts of the plaintiffs." App. at 288.

Despite these determinations, the Court in this proceeding has reversed the district court's conclusion that the plaintiffs are not a prevailing party.[1] It has directed that the matter be remanded so that the district court may enter an attorney's fee for the time plaintiffs' counsel has devoted to the supplemental agreement, which includes the time they spent opposing the investigation by HEW. Because the result reached by the majority appears to go considerably beyond the concept of "prevailing party" set forth by the Congress in the legislation and because it appears to far exceed the legislative intent which underlies the Fee Award Act, I believe it would be salutory for the court in banc to reexamine in the context of this case the reach of the "prevailing party" element set forth in the statute.[2]

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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1. The majority relies on *Sullivan v. Pennsylvania Dept. of Labor and Industry*, 663 F.2d 443 (1981), *cert. denied*, 102 S.Ct. 1716 (1982). That case, however, presented a much different situation. In *Sullivan*, there was no question that the plaintiff had prevailed. The issue was whether a counsel fee could be awarded when the victory was achieved in an arbitration proceeding rather than in the district court. Here the issue is whether any civil rights claim asserted by the plaintiff has been vindicted anywhere.

2. Furthermore, the mandate that the majority has ordered to be entered would appear to transgress the statute, the act places the initial determination of whether there is to be a fee, assuming there is a prevailing party, within the discretion of the trial court. Here such discretion has not yet been exercised, and there has been no showing that the exercise of such discretion will be abused.